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IN THE

Supreme Court of the United States

October Term, 1957

No. _____

In the Matter of

AQUA HOTEL CORPORATION (in reorganization),

Bankrupt.

Brief of Intervenor in Resistance to Petition for Writ of Certiorari.

In this morning's mail the undersigned received a petition for writ of certiorari apparently filed in this Court unverified, unsigned by an attorney who is a member of the bar of this Court and almost completely lacking in accurate record citations, which makes it most difficult to answer. The undersigned is appearing on behalf of Ralph J. Weiler, a creditor who had applied to the United States Court of Appeals for the Ninth Circuit and obtained permission to intervene and defend against the appeal. (See petitioners' Appendix, p. 2, lines 5-6.) Mr. Weiler therefore has standing before this Court in resisting the petition for writ of certiorari. Unfortunately the writer of this brief is not in possession of anything except a 213 page Reporter's Transcript of Proceedings in the District Court, and he does not have copies of any

of the orders or notices complained of by the petitioners. In view, however, of the fact that the petition for writ of certiorari bears on the cover the name of Morris Lavine, attorney at law, 215 West Seventh Street, Los Angeles 14, California, Trinity 3241, as attorney for the petitioners, the writer shall, notwithstanding the fact that neither the petition nor the brief is signed by a member of the bar of this Court and is completely unverified or sponsored, serve this brief in opposition to the granting of the writ on Mr. Lavine and file the same with this Court to the end that the interminable litigation involving the Aqua Hotel since February 14, 1956 (see petition for writ of certiorari, p. 2) be terminated and the administration of the estate proceed, secured creditors receive their money and unsecured creditors receive their dividend, if any.

Rule 39, subdivision 2, of the Rules of the Court reads as follows:

> "All printed documents presented to the Court, other than records, must bear on the cover the name and post office address of the member of the bar of this court who is counsel of record for the party concerned and upon whom service is to be made. The individual names of other counsel and, if desired, their post office addresses, may be added. The body of the document shall at its close bear the printed names of counsel of record and of such other individual counsel as may be desired . . ."

An attempt to verify the record references, insofar as the writer of this brief is concerned, leaves him completely in a fog. It remains a mystery to the writer whether the petitioners are referring to the Reporter's Transcript of Proceedings or to other documents in the record which

have not been served upon the writer or have not been made available to him. At page 13 of the petition we find:

> "Petitioners put an appraicer on the stand who gave the valuation of the property at $846,702 [R. 90] but his valuations and his report were not admitted in evidence."

An examination of the Reporter's Transcript does show that Elmo C. Bruner was called as a witness on behalf of the petitioners at page 85 of the Transcript, and at page 90 in response to a question by Mr. Lavine, he testified to a total figure of valuation of $846,702.00. But we have not been able to find any place in the record where Mr. Bruner's testimony was stricken nor any place where the Court refused to permit him to testify.

On the other hand, we find similar record references which clearly must pertain to something else. For instance, at page 3 of the petition, it is asserted:

> "It estimated its grand total of indebtedness at $456,022.79 [R. 9]; its assets it listed at $603,537.24. Its total net income for six months prior thereto was listed at $47,807.94 [R. 10]. It sets forth that upon reorganization that its estimated profits from food operations could be $368,000 gross and a net of $83,250 and that it had a potential slot machine profit of $40,000 [R. 13]."

An examination of the Reporter's Transcript, if this is the reference meant by petitioners in said petition, that pages 9, 10 and 13 were confined entirely to discussion between the Court and various counsel. Nowhere on any of said pages appears any of the figures set forth under the record references in the petition.

On page 3 of the petition we find the statement with a record reference:

> "The Court gave to *May* 11, 1956 to submit a plan or report why a plan cannot be effected [R. 22]." (Emphasis ours.)

Upon an examination of the Reporter's Transcript at page 22 is found a summarization by the Court of a report made by Thomas J. McLaughlin, Trustee in reorganization, in connection with which the Court says:

> "The Court fixed a date of *June* 11, 1956 as the time within which any interested persons should prepare and file a plan of re-organization or the Trustee should file his report of his reasons why a plan could not be effected." (Emphasis ours.)

At the bottom of page 3 of said petition the petitioners proceed to describe a plan "whereby it was proposed to issue 500,000 shares of additional stock with an application and a right to sell the same at $1.00 a share and Class B stock likewise to be redeemable [R. 31].

In the Reporter's Transcript at page 31 is a reading by the District Judge of the Trustee's recommendation that additional plans for reorganization would probably not be submitted due to the particularly heavy amount of indebtedness still outstanding against the corporation; the fact that little or no interest has been expressed by anyone in favor of submitting a plan of reorganization and the recommendation of the Trustee under Chapter X that the Court determine after reading the Trustee's report whether the Court should enter an order directing the Trustee to file a petition for an order either adjudging the debtor corporation bankrupt and directing that bankruptcy be proceeded with pursuant to the Bankruptcy

Act, or enter an order dismissing the proceedings under this chapter as in the opinion of the Judge may be in the interests of the creditors and stockholders.

We believe that the Justices of this Court passing on this petition for writ of certiorari will be just as bewildered as is the writer of this brief, unless there is some record before this Court which has not been served upon the writer and about which he knows nothing. He shall, however, briefly discuss the merit of this case and the reasons why, in his opinion, the petition for writ of certiorari should be promptly denied and the litigation terminated.

In the petition these petitioners attempt to at least insinuate to this Court that no notice was sent out to creditors, including appellants, that the Court would consider a plan of reorganization or a report on why such a plan cannot be effected that was sufficient notice that the corporation would be adjudicated a bankrupt. (See p. 9 of petition, subd. 4 under the subject of Questions Presented.)

The Reporter's Transcript shows that on Monday, November 5, 1956, a hearing was had before Judge Foley at which Patricia Springer appeared by her attorneys, John W. Bonner and Morris Lavine, and the debtor appeared by John A. Porter and the petitioner, John F. Cashen, appeared by John A. McNamee. At page 48 of the Reporter's Transcript is found that after the Court had recessed until 2:00 P.M., at the suggestion of the Court, Mr. Porter, counsel for the debtor, read:

> "Pursuant to the notice served the present hearing is stated to be concerned with the following matters . . . (3) why an order should not be entered adjudicating the debtor a bankrupt."

Strange indeed that this petitioning debtor and the holders of practically all of its stock should now contend that they had no intimation that the question of adjudication was to come up when the attorney for the corporation, himself, was reading a notice in open Court indicating that that subject would be passed on. At page 17 of the Transcript, the Court read from an order issued October 4, 1956, at which time there were present John A. Porter, attorney for the debtor corporation, Patricia Springer, formerly Patricia Cashen, creditor and stockholder, and Morris Lavine, attorney for Patricia Springer. The Court read at page 19 the following:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said trustee be and he hereby is directed to give at least 10 days notice of the time fixed herein for said hearing under Sections 169 and 236(2) of the Bankruptcy Act by mailing such notice to the creditors and stockholders of said debtor as the same may appear on the debtor corporation's records or as the same may be known to said trustee, to the Secretary of the Treasury, Washington, D. C., by mailing 2 copies of such notice to the Securities & Exchange Commission by registered first class mail, postage prepaid, addressed to it at Washington, D. C. or at such other place as the Securities & Exchange Commission shall designate by written notice filed in this proceeding, and served upon the parties to this proceeding, to all attorneys of record, and all other interested parties known to said trustee, and by publication thereof in the Las Vegas Review Journal and the Las Vegas Sun, each being newspapers published and having general circulation in Las Vegas, Nevada, on October 25, 1956, such notice to be as in the form attached hereto marked Exhibit 'A' and thereby made a part hereof."

It is to be presumed that the trustee did the duty imposed upon him by the Court. Strange it is, indeed, that none of the numerous parties in interest seeking certiorari here, or the attorneys representing them, received the notice prescribed under Section 236, subdivision 2, of the Act which expressly provides that:

> "After hearing upon notice of the debtor, stockholders, creditors, indenture trustees, and such other persons as the Judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the Judge may be in the interests of the creditors and stockholders."

It is rather an unusual situation, indeed that the contention should be made for the first time in this Court that these petitioners had no notice of the possibility of an adjudication in bankruptcy.

After reading the foregoing order, at page 32 of the Reporter's Transcript, the writer finds the following:

> "Court: Now, that is the order. Now, I take it that the trustee has given notice. Is that right Mr. Keefer?
>
> Mr. Keefer (attorney for the trustee): Yes, Your Honor.
>
> Court: And this Court is now in a position, so far as the jurisdiction of the Court is concerned, and the question of whether or not proper notice has been given to all interested parties, the Court would be in a position, if it felt that this was the proper thing to do, to adjudge the debtor a bankrupt at this time?

Mr. Keefer: Yes, Your Honor. However, the order and notice did provide for a hearing upon the plans.

Court: At the same time.

Mr. Keefer: At the same.

Court: The Court could have that hearing. However, if the Court, after the hearing, determined the proper procedure was to adjudge this debtor a bankrupt sufficient notice has been given to all parties?

Mr. Keefer: Yes."

In support of their petition for writ of certiorari, the petitioners content themselves with citing just three legal authorities, namely, *Continental-Illinois National Bank & Trust Co. v. Ehrhart,* 127 F. 2d 341; *Kelley v. Everglades Drainage District,* 319 U. S. 415, and cases cited in the quotation therefrom; *Powell v. Alabama,* 287 U. S. 68, 77 L. Ed. 170. (Petition, pp. 15-16.)

In support of a statement that the bankrupt was ... by the "Las Vegas slump" (Petition, p. 12), the petitioners cited "(See Life Magazine)."

Nowhere in the petition is there any contention that dissension exists between two or more Courts of Appeal, or that the District Court has decided an important question of local law in a way probably in conflict with applicable local decisions or has decided a Federal question in a way probably in conflict with applicable decisions of this Court or has so far departed from the usual accepted course of judicial proceedings, or so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision. See Rule 38, subdivision 5b of Rules of the Supreme Court.

The petitioners content themselves with merely stating at page 12 of the Petition that important questions of

bankruptcy law, which have not been but should be decided by this Court, are presented by this petition and that the Court below has also decided this case contrary to the law and contrary to Rules of Civil Procedure, Rule 52, requiring findings of fact and conclusions of law to be stated in bankruptcy, as well as other matters.

The writer does not believe that these petitioners were in any wise harmed or deprived of any of their rights. In the first place the jurisdiction of the District Court was voluntarily invoked by the petitioner Aqua Hotel Corporation through John S. Cashen, its president, under Section 128 of the Bankruptcy Act of 1938, 11 U. S. C. A., Section 528, which reads as follows:

> "If no bankruptcy proceeding is pending an original petition may be filed with the Court in whose territorial jurisdiction the corporation has its principal place of business or its principal assets for the preceding six months or for a longer portion of the preceding six months than in any other jurisdiction."

Complaint is made that upon failure to file a satisfactory plan of reorganization, District Judge Foley exercised his right to adjudicate this petitioner a bankrupt under the provisions of subdivision 2 of Section 236 of the Bankruptcy Act (11 U. S. C. A., Sec. 636). In fact, it should be expressly noted that even in the case of an involuntary petition filed against a corporation under Chapter X and controverted by it, not only is no provision for a jury trial made but on the contrary the Act expressly provides that the controverted issues of fact shall be determined by the Judge without the intervention of a jury. (See 11 U. S. C. A., Sec. 543.)

To put it briefly and succinctly, the plaint of petitioners before this Court now is that they voluntarily subjected

the Aqua Hotel Corporation to the jurisdiction of the United States District Court for the District of Nevada, proposed a plan of reorganization which was not satisfactory to the creditors or was not feasible and could not be approved, and found the corporation ultimately adjudicated a bankrupt. After staying the hands of their creditors (or rather the creditors of the corporation) for a period in excess of two years, the petitioners now ask this Court to review and reverse the well reasoned ruling of an experienced District Judge and reverse the opinion of the United States Court of Appeals, and demand that a new appraisal be made, a jury trial granted and the creditors held up for a couple of years more.

In the writer's opinion the petition for writ of certiorari in this case borders on the ludicrous. It is as though a debtor owing close to one-half million dollars in secured and unsecured obligations filed a voluntary petition in bankruptcy in the United States District Court having jurisdiction over his property and then, for some reason or other, changed his mind and took an appeal from the adjudication which he had voluntarily brought upon himself on the ground that the District Judge had not called a jury and submitted to it the questions of his insolvency and commission of an act of bankruptcy as provided for in involuntary cases under Section 19 of the National Bankruptcy Act. (11 U. S. C. A., Chap. 4, Sec. 42.) To sustain the position taken by these petitioners would, in our opinion, create a chaotic condition. It would permit debtors to file futile Chapter X or Chapter XI proceedings staying the hands of their creditors, postpone the payment of their honest debts and then, upon failure after a period of months or years to present a satisfactory or feasible plan, demand a jury trial as a prerequisite to their adjudication. In the case at bar, the hands of Aqua's creditors

have been stayed for at least 25 months. Because of dilatory appeals and obstructive tactics these creditors have been powerless to realize anything on their debts.

When Judge Roger Foley's patience ultimately ran out and he properly adjudicated Aqua a bankrupt, an appeal was taken to the Ninth Circuit, the judgment affirmed and on the last day to file a petition for rehearing such petition was filed. Rehearing was denied and was followed by an *ex parte* application for stay of mandate which was granted to April 10, 1958. A motion for modification of this *ex parte* order was granted by the Ninth Circuit on March 3, 1958, cutting down the time to apply for certiorari to March 20, 1958.

We will conclude by quoting from the language of Judge Clarke in the *Matter of Conway*, 127 F. 2d 972:

> "Having asked for mercy he can hardly be permitted to bite the hand from which it was dispensed. the ability to waive a constitutional provision intended for the protection of one's property rights is elementary."

We respectfully submit that the petition for writ of certiorari be promptly denied.

Dated: March 24, 1958.

THOMAS S. TOBIN,
Attorney for Respondent, Ralph J. Weiler.

FRANK C. WELLER,
HUBERT F. LAUGHARN,
Of Counsel.